RHB BANK BHD

v.

TAN KHAY GUAN

HIGH COURT MALAYA, ALOR SETAR
SOFIAN ABD RAZAK J
[CIVIL SUIT NO: 22-179-2004]
18 MARCH 2009

CIVIL PROCEDURE: *Stay of proceedings - Concurrent civil and criminal proceedings - Whether civil proceedings ought to be stayed pending completion of criminal proceedings - Proper approach - Whether disclosure of defence in civil proceedings would lead to potential miscarriage of justice in criminal proceedings - Whether justice of the case required civil proceedings be proceeded*

This was the defendant's application pursuant to O. 4 r. 1(c) and O. 92 r. 4 Rules of the High Court 1980 ('RHC 1980') and/or within the inherent jurisdiction of the court for an order stating *inter alia* (i) that all proceedings in this civil trial be stayed until the disposal of the criminal trial No: 62-70-2004. Briefly, the defendant was charged for an offence of criminal breach of trust under s. 409 of the Penal Code and at the time of this application the criminal trial had been fixed from 30 January 2005 to 2 February 2005. In the meanwhile, the plaintiff filed a writ and statement of claim and also filed an application for Mareva Injunction against the defendant. The defendant had yet to file its statement of defence nor had it filed in its affidavit in reply in respect of the Mareva Injunction. It was the defendant's submission that if the civil proceeding before this court were to proceed it would expose the defendant's defence and prejudice its defence in the criminal trial. The defendant further submitted that under the criminal justice system an accused person was entitled to remain silent and if this application were not allowed, then the defendant would have to file in an affidavit in reply for the injunction application and by doing so, it would tantamount to infringing the defendant's right to remain silent. The plaintiff, however, argued that the right to remain silent was only available to an accused person in a criminal trial and not extended to a civil trial (ss. 3 and 257(2) of the Criminal Procedure Code). Further,

A the plaintiff stated that the proceedings in the civil trial should be proceeded as it involved public interest in that it was a case of a manager of the plaintiff committing criminal breach of trust in the sum of RM20 million belonging to depositors and shareholders of plaintiff bank.

B

Held (dismissing defendant's application (encl. 20) with costs):

(1) Justice of the case required that the civil proceedings be proceeded. This court did not find that the disclosure of the statement of defence in the civil action and the filing of the affidavit in reply in respect of the plaintiff's application for a mareva injunction would lead to a potential miscarriage of justice in the criminal trial. The defendant's right of silence in the criminal trial remained intact and exercisable at the appropriate time. There was no miscarriage of justice or prejudice on the part of the defendant by refusing the defendant's application for a stay of proceedings in the civil trial. This court agreed with the decision in *Jefferson Ltd v. Bhetcha* that the protection given to defendant facing a criminal charge did not extend to giving the defendant as a matter of right the same protection (*ie*, the right of silence) in concurrent civil proceedings. (para 46)

(2) There would be no real prejudice to the defendant's right to a fair trial if the civil proceedings were heard before the criminal proceedings. The court was not persuaded that there was any sufficient reason to stay the proceedings. Until it is concluded many depositors and shareholders of the plaintiff would have no chance of recovering the money which they have lost. A serious injustice to the depositors and shareholders would be caused if all this had to wait until after the criminal trial had been concluded. The defendant's right and interest could be properly safeguarded in other ways. (para 48)

Case(s) referred to:

Cameron's Unit Services Pty Ltd v. Whelpton & Associates Pty Ltd 59 ALR 754 ***(refd)***

Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 CA ***(refd)***

Dato' Ding Lian Cheon v. Yap You Jee & Ors [1999] 8 CLJ 98 HC ***(refd)***

Jefferson Ltd v. Bhetcha [1979] 2 All ER 1108 ***(foll)***

Philippine Airline v. Goldair (Aust) Pty Ltd & Others [1990] VR 385 ***(refd)***

Polly Peck International plc v. Nadir [1992] BCLC 746 ***(refd)***

Re DPR Futures Ltd [1989] BCLC 634 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 3, 257(2)

Evidence Act 1950, s. 114(g)

Penal Code, s. 409

Rules of the High Court 1980, O. 4 r. 1(c), O. 14, O. 92 r. 4

Supreme Court of Judicature (Consolidation Act 1925) [UK], s. 41

For the plaintiff - M/s Lee Hishammuddin Allen & Gledhill

For the defendant - M/s Mohd Imtiaz Choong & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Sofian Abd Razak J:

[1] Enclosure 20 is the defendant's application contained in summons-in-chambers dated 7 December 2004 pursuant to O. 4 r. (1)(c) and O. 92 r. 4, Rules of the High Court 1980 (hereinafter called the RHC 1980) and/or within the inherent jurisdiction of the court for an order stating *inter alia* as follows:

(1) that all proceedings in this civil trial be stayed until the disposal of the criminal trial No: 62-70-2004 at the Alor Setar Sessions Court.

(2) that the defendant be given leave to file and serve the affidavit-in-reply to plaintiff's application for an order of Mareva Injunction and statement of defence to the plaintiff's claim within 14 days from the decision of the Sessions Court in the criminal trial against the defendant and/or

A (3) that the defendant be given leave to file and serve the affidavit-in-reply to the plaintiff's application for a Mareva Injunction and statement of defence to the plaintiff's claim within 14 days from the decision of the Sessions Court in the criminal trial against the defendant, and

B (4) Any other further order deem fit by the Honourable Court.

[2] The grounds for the said application are that:

(1) the defendant was charged under s. 409 of the Penal Code
C where the defendant claimed trial and the hearing was fixed from 30 January 2005 till 2 February 2005.

(2) the plaintiff had filed an application for a Mareva Injunction and has been fixed for hearing on 25 January 2005.

D (3) if the civil trial is not stayed and the proceedings proceeded, the defendant will have to file and serve his affidavit-in-reply and statement of defence and this will expose and prejudice the defendant's defence in the criminal trial which has not
E commenced.

(4) the filing of the defendant's statement of defence will prejudice the defendant's defence in the criminal trial.

(5) the exposure of the defence of the defendant before the
F commencement of the criminal trial will result in the defendant forfeiting his right to remain silent in his criminal trial which is allowed under the Federal Constitution and Criminal Procedure Code before the defendant is found guilty.

G (6) the defendant had pleaded not guilty to the criminal charge and is deemed to be innocent unless otherwise proven and should be allowed to defend himself and without any prejudice.

(7) the defendant's application will not prejudice the plaintiff's case
H because;

(a) the plaintiff had recovered a sum of RM2,507,407.20 from the account of Rockwell and Bonds Limited at the Bank of East Asia, Hong Kong SAR as informed by the
I plaintiff's solicitor to the court on 24 November 2004 in the oral application on the amount claim by the plaintiff against the defendant in the amended writ and statement of claim dated 6 October 2004.

(b) the plaintiff had also obtained an injunction order dated 8 October 2004 from the High Court Hong Kong SAR against Rockwell and Bonds Limited for the sum of RM19,069.

Both the amount as stated above is in excess of the amount which is lost and claimed by the plaintiff against the defendant in the amended writ and statement of claim dated 6 October 2004 filed herein.

(c) the defendant could not possibly be able to dispose of any assets because the defendant is currently in remand and without any bail until the trial disposal of the criminal trial and the whole of the said sum allegedly lost were discovered by the plaintiff in the bank account in the foreign countries not managed by the defendant.

[3] Enclosure 20 was fixed for mention on several dates and the court then directed both parties to file in their respective further affidavits and to be followed by the filing of the written submissions. The court then adjourned the case for decision to 14 August 2006.

The Submission By The Defendant

[4] The learned counsel for the defendant submitted that if the civil proceeding before this court were to proceed it will expose the defendant's defence and prejudice its defence in the criminal trial. This is based on the same allegations as found in both the civil and criminal trial. The learned counsel for the defendant further submitted that under the criminal justice system an accused person is entitled to remain silent and if this application is not allowed, then the defendant would have to file in an affidavit-in-reply for the injunction application. By filing an affidavit-in-reply it would tantamount to infringing the defendant's right to remain silent.

[5] The learned counsel for the defendant cited the case of *Dato' Ding Lian Cheon v. Yap You Jee & Ors* [1999] 8 CLJ 98 where the court held that:

A Where there are concurrent civil and criminal proceedings in respect of the same subject matter, the Court having control of the civil proceedings could, in the exercise of its discretion, stay these proceedings if it appears to the Court that justice so requires, having regard to the Defendant's right of silence in relation to the concurrent criminal proceedings.

B

The Submission By The Plaintiff

[6] The learned counsel for the plaintiff submitted that the right to remain silent is only available to an accused person in a criminal C trial and not extended to a civil trial. Reference is made to ss. 3 and 257(2) of the Criminal Procedure Code (hereinafter called 'the CPC') s. 257(2) of the CPC states as follows:

(2) The failure at any trial of any accused to give evidence shall D not be made the subject of adverse criticism by the prosecution.

[7] In the civil trial, the court has the power to draw inferences against the defendant under s. 114(g). Learned counsel for the plaintiff cited the case of *Chan Yoke Lain (administrator of the estate* E *of Chong Yoke Fah, deceased) v. Pacific & Orient Insurance Co. Sdn. Bhd.* [1999] 1 CLJ 179 where the court invoked s. 114(g) of the Evidence Act 1950 to draw an adverse inference on the failure to call material witness.

F **[8]** The learned counsel for the plaintiff further submitted that the presumption of innocence is only applicable to a criminal proceeding and not applicable to a civil proceeding.

[9] On the question of who has the burden to satisfy the court G that the civil proceeding ought to be stayed, the learned counsel for the plaintiff submitted that it was the burden of the defendant to do so. Reference was made to the case of *Jefferson Ltd v. Bhetcha* [1979] 2 All ER 1108 where the court held that on the facts, the defendant had not established, it was either just or H convenient for the civil trial to be stayed.

[10] The learned counsel for the plaintiff stated that the proceedings in the civil trial should be proceeded as it involves public interest in that it was a case of a manager of the plaintiff committing criminal breach of trust in the sum of RM20 million I belonging to depositors and shareholders of plaintiff bank.

The Brief Facts Of The Case From Plaintiff's View

[11] The plaintiff is at all material times, a licenced bank with branches at:

(a) No. 1519, Jalan Tunku Ibrahim, PO Box No. 3, 05700 Alor Setar ("1st branch");

(b) No. 97J, Seberang Jalan Putra, 05150 Alor Setar, Kedah ("2nd branch"); and

(c) Nos. 112 & 114, Jalan Tan Sri Teh Ewe Lim, 11600 Pulau Pinang ("Jelutong branch").

[12] The defendant was at all material times the Consumer Banking Manager of the 2nd branch.

[13] The defendant's misappropriation of the plaintiff's funds was first discovered at the 2nd branch on or about 21 September 2004.

[14] On or about 21 September 2004, an officer at the 2nd branch noticed that large amounts of money were being withdrawn from the current account of two individuals by the names of Mr. Lam Kong Heng ("LKH") and Mr. Ong Hock Soon ("OHS") ("the said accounts") in the form of cash cheques ("cash cheques").

[15] Subsequent investigations revealed that the said accounts were not secured by fixed deposits.

[16] The matter was then brought to the attention of Mr. Joginder Singh ("JS"), Head of Branch Operations Department. JS immediately attempted to contact the defendant but failed to do so.

[17] On 24 September 2004, JS managed to contact the defendant on his mobile phone and the defendant agreed to meet JS at the 2nd branch on that same day. However, the defendant failed to turn up for the meeting.

[18] Subsequent investigations by the bank officers revealed the following:

(a) the defendant fraudulently maintained fictitious credit lines in the said accounts;

A (b) since the creation of the said accounts, the defendant had been misappropriating funds through cash cheques;

(c) part of the misappropriated monies was traced to a bank account in Hong Kong that is "The Bank of East Asia
B Limited", bank account number: 015-514-25-07698-4 ("The Rockwell Account") in the name of "Rockwell and Bond Limited"("Rockwell Limited").

[19] Based on the above findings, a police report was lodged with
C the Alor Setar police.

[20] The plaintiff subsequently sent its Group Internal Audit team ("GIA") to investigate the misappropriation of funds at the 2nd branch. The GIA's investigations revealed that:

D (a) the opening of the said accounts were approved by the defendant himself; and

(b) however, the GIA was unable to trace the:

(i) account opening maintenance report;
E

(ii) account opening form; and

(iii) specimen signature card

[21] The following documents were further discovered during the
F police search of the defendant's own office room:

(a) cheque books belonging to the said accounts; and

(b) bank statements for the said accounts which were marked "Do Not Mail".
G

[22] Based on the said cheque books and statements, the GIA concluded that the said accounts were in the full control of the defendant.

H **[23]** The GIA further discovered that many cash cheques have been issued from the said accounts. The breakdown of the cash cheques issued from the said accounts are as follows:

I

	LKH's Account		OHS's Account	
Month (2004)	**Number of Cheques Issued**	**Total (RM)**	**Number of Cheques Issued**	**Total (RM)**
April	3	743,840	7	516,865
May	8	2,599,650	3	1,051,855
June	6	1,531,875	8	2,945,260
July	4	544,260	3	410,750
August	9	1,685,000	7	2,214,400
September	11	3,685,100	10	2,517,550
Total	**41**	**10,789,725**	**38**	**9,656,680**

[24] GIA also discovered that after the cash cheques were issued, a sum of RM19,069,166 was transferred to the Rockwell Account by way of telegraphic transfers. Details of the said telegraphic transfers are as follows:

Month (2004)	**Number of Cheques Issued**	**Amount in USD**	**Amount in RM**
April	12	289,000	1,102,246
May	11	945,000	3,604,230
June	13	1,102,500	3,899,815
July	3	287,500	1,096,525
August	6	890,000	3,399,350
September	10	1,560,000	5,967,000
Total	**55**	**5,084,000**	**19,069,166**

[25] GIA discovered that the defendant had indicated on the reverse side of each cash cheque that confirmation had been made with the customers for issuance of the cash cheques.

[26] As the defendant was once head of the 1st branch and Jelutong Branch, investigations were also carried out at both the said branches.

[27] Investigations revealed that the defendant had also created one fraudulent current account each at the 1st branch and Jelutong Branch respectively.

[28] Both the fraudulent accounts at the 1st branch and the Jelutong Branch were opened under the name of Chong Joo Huai ("CJH").

[29] GIA discovered that the defendant used the same *"modus operandi"*, that is, withdrawing monies from the CJH accounts through cash cheques which were subsequently paid to Rockwell Limited *via* telegraphic transfer.

[30] As a result of the defendant's actions, the plaintiff has suffered a loss of:

(a) RM10,544,858.41, that is, the outstanding sum in the LKH account;

(b) RM9,421,826.58, that is, the outstanding sum in the OHS account;

(c) RM175,645.14, that is, the outstanding sum in the Jelutong Branch Account; and

(d) RM388,276.43, that is, the outstanding sum in the 1st branch account.

[31] As a result of the misappropriation by the defendant, the defendant was charged for an offence of criminal breach of trust under s. 409 of the Penal Code and at the time of this application the criminal trial No: 62-70-2004 has been fixed from 30 January 2005 till 2 February 2005.

[32] In the meanwhile, the plaintiffs had filed a writ and statement of claim (encl. 1) and also filed an application for Mareva Injunction against the defendant (encl. 3). The defendant has yet to file in its statement of defence nor has it filed in its affidavit-in-reply in respect of the Mareva Injunction. Enclosure 20 filed by the defendant is for a stay of proceedings pending the disposal of the criminal trial at the Sessions Court Alor Setar and

to allow the defendant to file its statement of defendant and/or affidavit-in-reply within 14 days from the decision of the Sessions Court in the criminal trial.

Finding Of The Court

[33] The learned counsel for the defendant in his submission to this court relied on the case of *Dato' Ding Lian Cheon v. Yap You Jee & Ors (supra)*. The brief facts of *Dato' Ding Lian Cheon*'s case are that the plaintiff commenced a civil suit against the defendants' alleging that the defendants had committed fraud against the plaintiff for making false representations and promises which induced the plaintiff into giving a cashier order of RM6 million to the defendants. The plaintiff had also lodged a police report which led to the arrest of the defendants. The defendants were then charged in the Sessions Court. The criminal trial is still pending and at its advance stage. The plaintiff filed an application for a stay of the civil suit pending the completion of the criminal trial. It was submitted that the facts in both the criminal and civil case were on similar lines and priority should be given to the criminal case.

[34] The learned judge allowed the plaintiff's application to have the civil proceedings stayed pending the trial disposal of the criminal trial. In his Lordship's decision, the important factor to be taken into account by the court in deciding whether to grant a stay was whether there was a real and not merely a national damage that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings. The learned judge further stated that the defendant's right of silence in the criminal proceedings remained intact and exercisable by them at the appropriate time. There was no miscarriage of justice or prejudice on the part of the defendant when the court granted the stay of the civil proceedings as it was within the realm of the court to control the suit.

[35] Whilst I agreed with the principle of law expounded by the learned judge, but the facts in *Dato' Ling Lian Cheon*'s case and the facts of the instant case has one distinctive difference in that, in the instant case, it was the defendant who had applied for a stay of the proceeding in the civil trial pending the disposal of the criminal trial. Essentially the trust of the defendant's application here is that if no stay is granted it will take away the defendant's

A right of silence and fearing that whatever statement of defence and/or affidavit-in-reply filed would expose the defendant's defence. The learned counsel for the defendant in his submission submitted that in the event the civil proceedings is not stayed, the defendant as an accused person in the criminal trial would lose his basic and
B inherent rights to remain silent and not give evidence.

[36] The learned judge in *Dato' Ding Lian Cheon (supra)* and the learned counsel for the plaintiff in the instant case also referred to the case of *Jefferson Ltd v. Bhetcha (supra)* but both seem to have
C different views regarding the said case.

[37] The brief facts of *Jefferson Ltd v. Bhetcha (supra)* are that: The plaintiffs employed the defendant as a general accounts clerk from March 1978 until 30 September 1978 when she was
D dismissed. In November 1978, the plaintiffs discovered that five cheques appeared to had been misappropriated. Three out of the five cheques had been paid into a building society account in the defendant's name and the remaining two into an account of a friend of hers. The plaintiffs brought an action against the
E defendant claiming Pound Sterling 29,190.46 being the total value of the cheques. After the defendant had entered an appearance, the plaintiffs applied by summons for summary judgment under RSC O. 14. By then criminal proceedings were also pending against the defendant in respect of the cheques. In an affidavit the
F defendant stated that she had a defence both to the action and criminal charges, but if she was required to swear on affidavit in opposition to the plaintiff's summons under RSC O. 14 it would necessarily disclose her defence to the criminal charges and prejudice her trial because she would be giving the prosecution
G advance of her case. She contended that the plaintiffs' action against her should be stayed until the conclusion of the criminal proceedings.

[38] On the defendant's undertaking to pay pound sterling 24,206.80 into a solicitor's joint account, the judge ordered the
H summons for summary judgment to be adjourned until after her trial. The judge apparently acted on the basis that it was an absolute principle of law that where there were concurrent civil and criminal proceedings against a defendant in respect of the same subject matter the defendant's right of silence in the criminal
I proceedings carried through to the civil proceedings and the

defendant was therefore entitled in the civil action to be excused from taking any procedural step which would in the ordinary way be necessary or desirable to take in furtherance of her defence in that action, if that step would or might have the result of disclosing in whole or in part her actual or likely defence in the criminal proceedings. The plaintiff appealed against the judge's order. The defendant cross-appealed contending that the appropriate form of relief was not an order adjourning the RSC O. 14 summons but an order staying the civil action until the conclusion of the criminal proceedings.

[39] The Court of Appeal held that the protection given to a defendant facing a criminal charge (ie, the right of silence) did not extend to giving him as a matter of right the same protection in concurrent civil proceedings. The Court of Appeal too held that the court having control of the civil proceedings could, however, in the exercise of its discretion under s. 41 the Supreme Court of Judicature (Consolidation Act 1925) stay those proceedings if it appeared to the court that justice so required, having regard to the concurrent criminal proceedings and the defendant's right of silence in relation to those proceedings and the reasons for that right.

[40] In the case of *Philippine Airline v. Goldair (Aust) Pty Ltd & Others* [1990] VR 385 where the brief facts are that a defendant applies for a stay of the civil proceedings until the completion of the criminal proceedings on the ground that he has been charged with offences arising out of the same events involved in the civil proceedings.

[41] The Supreme Court of Victoria held at pp. 387-388 as follows:

> In *Cameron's Unit Services Pty Ltd v. Whelpton & Associates Pty Ltd* [1984] 59 ALR 754 Wilcox J in the Federal Court had to consider an application for a stay of civil proceedings until the completion of the criminal proceedings on the ground that one of the parties to the civil proceedings had been charged with offences arising out of the same alleged events involved in the civil proceedings.
>
> Wilcox J referred to *Beecee Group Ltd v. Barton* [1980] 5 ACLR 33 in which Waddell J had refused to stay proceedings for the recovery of certain moneys because of the pendency of criminal proceedings and to the decision of Wootten J in *McMahon v.*

A *Gould* [1982] 1 ACLC 98 ... . In the latter case Wootten J set out some principles which he had distilled from the authorities and which were accepted by Wilcox J.

Those principles were as follows:

B (a) *prima facie* a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court ...;

(b) it is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper
C grounds ...;

(c) the burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with ...;

D (d) neither an accused *(ibid)* nor the Crown ... are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;

(e) the court's task is one of "the balancing of justice between the parties "..., taking account of all relevant factors ...;
E

(f) each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors;

F (g) one factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's 'right of silence', and the reasons what that right, under the law as it stands, is a right of a defendant in criminal proceeding ...;

G (h) however, the so-called 'right of silence' does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to
H defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding;

I (i) the court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings ...;

(j) in this regard factors which may be relevant include: A

(i) …;

(ii) the proximity of the criminal hearing;

(iii) the possibility of miscarriage of justice eg, by disclosure of defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses; B

(iv) the burden on the defendant or preparing for both sets of proceedings concurrently …; C

(v) whether the defendant has already disclosed his defence to the allegations …;

(k) the effect on the plaintiff must also be considered and weighed against the effect on the defendant …; D

(l) in an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed …;

And at page 389: E

There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under Order 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceedings. The protection which is at present given to one facing criminal charge – the so-called 'right of silence' – does not extend to give the defendant as a matter of right the same protection in contemporaneous proceeding; F G

[42] In the case of *Polly Peck International plc v. Nadir* [1992] BCLC 746 where the brief facts are criminal proceedings were pending which had a substantial overlap with the claims in the civil action. Knox J held that: H

In my view, the right to silence is not of such overriding importance as to prevent the taking of some risks of the nature of defence being revealed to the prosecution in the interests of safeguarding legitimate interest of the plaintiff and thereby its creditors and of the other defendants. I

[43] In *Cameron's Unit Services Pty Ltd. v. Whelpton & Associates Pty Ltd.* 59 ALR 754 where the brief facts are that the applicants brought an action for damages against the respondents. The respondents sought a stay of the civil proceedings until completion of the criminal proceedings on the ground that the second respondent, director of the first respondent, had been charged with offences arising out of the same alleged events involved in the civil proceedings. Wilcox J held that:

> In my view the court's discretion should be exercised in favour of refusing the application for a stay of civil action. The existence of the criminal proceedings is an additional reason for taking all necessary steps to ensure a speedy determination of the civil proceedings.

[44] In *Re DPR Futures Ltd* [1989] BCLC 634 where the brief facts are that three former directors and the shareholders were arrested and charged *inter alia* with conspiracy to defraud. The joint liquidators issued proceedings against the directors to recover Pound Sterling 2.3 million alleged to have been unlawfully withdrawn by them from the company. The joint liquidators obtained *ex parte* Mareva Injunctions against the directors. The directors sought a stay of the proceeding brought by the joint liquidators until after the trial of the criminal charges preferred against them.

Millet J held that:

> it was not necessary to order a stay of the proceedings thereby delaying the date when numerous small investors might receive their money in order to safeguard the directors right to a fair criminal trial.

[45] Reverting to the facts of the instant case, the court is of the view that it is implicit in the judgment *Jefferson Ltd v. Bhetcha (supra)* that the court having control of the civil proceedings could exercise its discretion to stay those proceedings if it appeared to the court their justice so required, having regard to the concurrent criminal and civil proceedings.

[46] In the instant case, the court is of the view that justice of the case requires that the civil proceedings to be proceeded. The court does not find that the disclosure of the statement of defence in the civil action and the filing of the affidavit-in-reply in respect of the plaintiff's application for a Mareva Injunction would lead to

a potential miscarriage of justice in the criminal trial. The defendant's right of silence in the criminal trial remained intact and exercisable at the appropriate time. There was no miscarriage of justice or prejudice on the part of the defendant by refusing the defendant's application for a stay of proceedings in the civil trial.

[47] The court agrees with the decision in *Jefferson Ltd v. Bhetcha (supra)* that the protection given to defendant facing a criminal charge did not extend to giving the defendant as a matter of right the same protection (ie, the right of silence) in concurrent civil proceedings.

[48] The court is satisfied that there will be no real prejudice to the defendant's right to a fair trial if the civil proceedings were heard before the criminal proceedings and the court is not persuaded that there is any sufficient reason to stay the proceedings. Until it is concluded many depositors, and shareholders of the plaintiff have no chance of recovering the money which they have lost. A serious injustice to the depositors and shareholders would be caused if all this had to wait until after the criminal trial had been concluded. In the court's view, the defendant's right and interest can be properly safeguarded in other ways.

Conclusion

[49] Based on the reasons as adumbrated above, in all the circumstances, the court dismissed the defendant's application (encl. 20) with costs. It was further ordered that the affidavits and the pleadings of the defendant that is to be used in this case and for other cases is with the leave of the court and both parties are at liberty to apply.